IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

No. 573

NATIONAL LABOR RELATIONS BOARD, *Petitioner*

v.

GISSEL PACKING COMPANY, INC., ET AL.

NATIONAL LABOR RELATIONS BOARD, *Petitioner*

v.

HECK'S, INC.

NATIONAL LABOR RELATIONS BOARD, *Petitioner*

v.

GENERAL STEEL PRODUCTS, INC., ET AL.

No. 691

FOOD STORE EMPLOYEES UNION LOCAL 347,

v. *Petitioner*

GISSEL PACKING COMPANY, INC., ET AL.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

MOTION FOR LEAVE TO FILE A BRIEF AS AMICUS CURIAE

The American Federation of Labor and Congress of Industrial Organizations (AFL-CIO) hereby respectfully moves for leave to file a brief as *amicus curiae* in the instant case in support of the position of the Petitioners, as provided for in Rule 42 of the Rules of this Court. The consent of the Solicitor General and of counsel for the Union has been obtained. Counsel for the Respondents have refused their consent.

INTEREST OF THE AFL-CIO

The AFL-CIO is a federation of one hundred and twenty-two affiliated labor organizations with a total membership of approximately thirteen million. During the past decade the organizing efforts of the trade union movement have been pursued with great vigor. These efforts have all too often met with illegal employer opposition designed to coerce employees who would otherwise support unionization, *see,* McCulloch, *New Remedies Under the National Labor Relations Act,* 68 LRR 60, 63 (1968); Report of the Special Subcommittee on Labor, Committee on Education and Labor, House of Representatives, 90th Cong. 2nd Sess., *National Labor Relations Act Remedies: The Unfulfilled Promise,* 1-5, 30 (1968) (Thompson Report). It is the consensus of the impartial experts who have studied the matter that this rising tide of disregard for the prohibitions contained in §§8(a)(1) and (3) of the National Labor Relations Act as amended 61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151 *et seq.* is the direct result of the impotence of the Board's remedies, Report of the Subcommittee On National Labor Relations Board, of the Committee on Education and Labor, 87th Cong. 1st Sess., *Administration of the Labor-Management Relations Act by the NLRB,* 20-24 (1961) (Pucinski Report); Bok, *The Regulation of Campaign Tactics in Representation Elections Under the National Labor Relations Act,* 78 Harv. L. Rev. 38, 64-65, 124-125 (1964); Note, *The Need for Creative Orders Under Section 10(c) of the NLRA,* 112 U. Pa. L. Rev. 69 (1963). It is also the consensus of the organizing staffs of the Federation and its affiliated unions that of the Board's traditional remedies

the bargaining order is by far the most effective and meaningful. The practical effect of the instant decisions of the Fourth Circuit is to strip the Board of its authority to issue such orders. The profound impact of these decisions is thus manifest and for this reason the AFL-CIO requests this opportunity to present its views to this Court.

ISSUE NOT COVERED BY THE PETITIONERS

The Board takes the view that the primary basis for the bargaining order stems from §8(a)(5) of the Act. It is our view that in cases such as the instant ones, it is most fruitful to view the bargaining order as a remedy for the employers' violations of §§8(a)(1) and (3) during an organizing campaign. This view, we believe, has the virtue of placing the interests at stake in sharper focus and promises to simplify proceedings involving illegal employer interference with organizational efforts. The main burden of our *amicus* brief will be devoted to developing this point.

CONCLUSION

For the above stated reasons we respectfully urge the Court to grant this motion for leave to file the accompanying *amicus* brief in the instant cases in support of the position of the Petitioners.

Respectfully submitted,

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BRIEF FOR THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS AS AMICUS CURIAE

This *amicus* brief is filed by the American Federation of Labor and Congress of Industrial Organizations (AFL-CIO), contingent upon the Court's granting the foregoing motion for leave to file a brief as *amicus curiae*.

The opinions below, jurisdiction, questions presented, and the statutory provisions involved are set out in the Petitioners' briefs.

The interest of the AFL-CIO is set out at pp. vi of the foregoing motion for leave to file a brief as *amicus curiae*.

ARGUMENT

THE NLRB'S REMEDIAL AUTHORITY INCLUDES THE POWER TO ISSUE BARGAINING ORDERS WHEN AN EMPLOYER COMMITS VIOLATIONS OF §§8(a)(1) & (3) OF THE NLRA DURING A UNION ORGANIZING CAMPAIGN

In *Gissel Packing Co., Heck's* and *General Steel,* the National Labor Relations Board found that the majority of the employees in each of the bargaining units had clearly and unequivocally authorized the Union to represent them for the purposes of collective bargaining at the time of its demand for recognition. The Board also found that the authorization cards collected to show majority status were obtained through proper methods of solicitation, in which fraud, duress and misrepresentation played no part. These findings were not disturbed by the court below. In each case the Company responded to this demand by refusing recognition and by waging an anti-union campaign during which it committed substantial unfair labor practices.

Thus, in *Gissel* both the Board and the court below found that the Company coercively interrogated employees concerning their union activities, threatened them with discharge and other economic harm, and promised them benefits—all in violation of §8(a)(1) of the National Labor Relations Act as amended, 61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151 *et seq;* and that the Company discriminatorily discharged two employees, in violation of §§8(a)(3) and (1). In *Heck's,* the Board and the court below found that the Company coercively interrogated employees, threatened reprisals against them for supporting the Union, created the impression of surveillance of their union activities, and

offered them benefits in exchange for opposition to the Union—all in violation of §8(a)(1); and that the Company discriminatorily discharged the leading union adherent, in violation of §§8(a)(3) and (1). In *General Steel*, the Board and the court below found that the Company interrogated employees and threatened them with reprisals, including discharge, in violation of §8(a)(1).

The Board ordered the Companies to cease and desist from the unfair labor practices found and to offer reinstatement and back pay to the employees who had been discriminatorily discharged; the court below enforced these provisions of the orders. The Board also ordered the Companies to bargain with the Union involved upon request, but the court below refused enforcement of this portion of the orders. Thus, the point at which the Board and the Fourth Circuit diverged was the proper remedy to apply to an employer who has opposed an organizing campaign by committing unfair labor practices.

The Board's basic argument in support of its position is that it has the power to issue bargaining orders to remedy refusals to bargain which are illegal under §8(a)(5) of the Act, that an employer violates §8(a)(5) when he refuses recognition to a union which has achieved majority status through valid authorization cards unless he has a "good faith doubt" about that majority, and that the commission of independent violations of §§8(a)(1) and (3) makes out a *prima facie* case of an illegal bad faith refusal to bargain rather than a lawful good faith refusal. As its brief demonstrates at length, this argument in favor of the bargaining orders issued here is entirely rational, and in complete accord with the plan of the Act. Nevertheless, it is our view that while the Board's position is sound, it is needlessly complex and difficult to apply. We submit that where, as here, an employer commits a number of §§8(a)(1) and (3) violations during an organizing campaign, there is no need to deal with the question of whether his earlier refusal to bargain violated §8(a)(5), for a bargaining order is the necessary and proper remedy for his acts of restraint and

coercion. The questions relating to the substantive nature of the obligation to bargain imposed by §8(a)(5); the relationship between that obligation and the election process, *compare, Snow & Sons,* 134 NLRB 709 *enforced,* 308 F.2d 687 (C.A. 9th Cir., 1962) *with, Aaron Bros.,* 158 NLRB 1077 (1966); and the comparison between the reliability of authorization cards and a representation election, *see,* Spindel, *Union Authorization Cards: A Reliable Basis for an NLRB Order To Bargain,* 47 Tex. L. Rev. 87 (1968) are all interesting ones but they should not be thought to loom large in the administration of the Act:

> "In fiscal 1967, the Board conducted 8,116 elections, as opposed to 157 cases in which union majorities were established by cards apart from elections (approximately 1.9 percent of the elections conducted). Of these 157 cases, all but 16 involved situations in which a fair election was made impossible or was invalidated by employer unfair labor practices." Supplemental Memorandum of the National Labor Relations Board to the Subcommittee on the Separation of Powers, Committee on the Judiciary, United States Senate, 69 LRR 157, 165 (1968).

These figures make it plain that the debate over the employers right to an election is largely academic, and that the question of the comparative merits of authorization cards and a Board conducted election is basically metaphysical. The critical cases that come before the Board are those, such as the instant ones, in which the employer has violated §§8(a)(1) & (3) of the Act in a manner which makes it fair to say that the unfair labor practices were calculated to frustrate unionization. For unless adequate remedies which may be simply and speedily administered are devised to put aright matters that the unfair labor practices set awry it must be expected that the functioning of the entire representation election system will be placed in jeopardy. It is for this reason that we eschew this opportunity to speak to the full range of issues that might be said to be raised here and concentrate instead on the basic question of the proper remedy for substantial violations of the Act during organizing campaigns.

1. The Fourth Circuit has taken the basic position that the Taft-Hartley amendments to the Act provide an employer with an absolute indefeasible right to a Board certification as the condition precedent to bargaining, *see, National Labor Relations Board* v. *S. S. Logan Packing Co.*, 386 F.2d 562 (C.A. 4th Cir., 1967); *see also, Comment: Union Authorization Cards*, 75 Yale L. J. 805 (1965). If correct, this position would of course be fatal to both our argument and the Board's But the Fourth Circuit position is clearly wrong. Its major flaw is that it is directly contrary to the post-Taft-Hartley decision of this Court in *United Mine Workers* v. *Arkansas Oak Flooring*, 351 U. S. 62, 71-72, 74-75 (1956):

> "Section 8(a)(5) declares it to be an unfair labor practice for an employer 'to refuse to bargain collectively with the representatives of his employees, *subject to the provisions of section 9(a).*' (Emphasis supplied.) Section 9(a), which deals expressly with employee representation, says nothing as to how the employee's representative shall be chosen. See Lebanon Steel Foundry v. N.L.R.B. 76 App DC 100, 103, 130 F2d 404, 407. It does not make it a condition that the representative shall be certified by the Board."
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> "Section 7 recognizes the right of the instant employees 'to bargain collectively through representatives of their own choosing' and leaves open the manner of choosing such representatives when certification does not apply. The employees have exercised that right through the action of substantially more than a majority of them authorizing the instant union to represent them . . . and by virtue of the conceded majority designation of the union, the employer is obligated to recognize the designated union."

Normally we would be content to rest on *stare decisis* alone but since the legislative basis of *Arkansas Oak Flooring* has seemingly escaped the Fourth Circuit, and some commentators, and since this point is at the heart of this controversy, we set out the essence of the legislative history. Section 8(5) of the Wagner Act made it an unfair labor practice for an employer "to refuse to bargain collectively

with the representatives of his employees, subject to the provisions of Section 9(a)." The relevant provision of §9(a) was that the representative shall be "designated or selected for the purposes of collective bargaining by the majority of the employees in a union appropriate for such purposes . . ." Thus, while §9(c) of the Act provided for Board certification of the results of "a secret ballot of employees" or "any other suitable method to ascertain [the employees'] representatives," no particular form of designation or selection was prescribed as mandatory by the Wagner Act.

In *Cudahy Packing Co.*, 13 NLRB 256 (1939) the Board ruled that unless both parties agreed to some other method, certifications would issue only after a secret ballot election. However, after *Cudahy*, the Board with court approval, *see, Franks Bros. Co.* v. *National Labor Relations Board*, 321 U. S. 702 (1944), continued to issue bargaining orders, as opposed to certifications, where there had been no election. For, before the 1947 amendments to the Act, with the relevant statutory language identical to that which now obtains, it was settled "that an employer may not require certification as condition precedent to bargaining . . ." *L. B. Hartz*, 71 NLRB 848, 871 (1946). "The contention that bargaining was not mandatory until the Board has accredited [the union] as bargaining agent is frivolous. An employer is under a duty to bargain as soon as the union representative presents convincing evidence of majority support." *National Labor Relations Board* v. *Dahlstrom Metallic Door Co.*, 112 F.2d 756, 757 (C.A. 2nd Cir., 1940). In this state of the law, when Congress in the 1947 amendments carried over the relevant statutory language without change, "it is a fair assumption that by reenacting without pertinent modification the provision with which we here deal, Congress accepted the construction placed thereon by the Board and approved by the courts." *National Labor Relations Board* v. *Gullett Gin Co.*, 340 U. S. 361, 366 (1951). But we need not rest with inference from silence, for Congress in 1947 rejected a proposal the precise consequence of which would have been to make bargaining obligatory only in the event of a union's certification as representative.

The House bill, as reported and passed, provided that it was an unfair labor practice for an employer "to refuse to bargain collectively with the representatives of his employees currently recognized by the employer or certified as such under Section 9." 1 Legislative History of the Labor Management Relations Act, 1947 (G.P.O. 1948) 51, 178. Under this provision recognition of an uncertified union was optional with the employer. H. Rep. No. 245, 80th Cong., 1st Sess. 30, in 1 Leg. Hist. 321. But the Senate bill, as reported and passed, contained the preamendment language unchanged. 1 Leg. Hist. 111, 239. The Senate version prevailed in conference. The House Conference Report stated that the conference agreement follows the provisions "of existing law." H. Conf. Rep. No. 510, 80th Cong., 1st Sess., 41, in 1 Leg. Hist. 545. Senator Taft reported to the Senate that the "Senate conference refused to yield to the House with respect to the provisions contained in the House bill amending the provisions in . . . subsection 8(5) relating to collective bargaining. This means that the five unfair labor practices contained in the present National Labor Relations Act remain unchanged [except for a presently immaterial difference]." 93 Cong. Rec. 6443, in 2 Leg. Hist. 1539. It is true, of course, that while the proposed House amendment to §8(5) failed, §9(c) was amended to restrict the Board to secret ballot elections in issuing certificates. But in light of the *Cudahy* decision this amendment did little more than bring the Act into conformity with the Board's self-imposed limitations. Certainly in light of the well-settled law that certification was not the sole route to recognition and the defeat of the proposed amendment to §8(a)(5), this change in the law does not support the position of the Fourth Circuit.

And so, now as before the amendments, "the right of employees to bargain collectively through an exclusive bargaining representative, is not conditioned upon an antecedent certification by the Board . . ." *National Labor Relations Board* v. *Kobritz*, 193 F.2d 8, 14 (C.A. 1st Cir., 1951). The short of it is that methods other than elections including "cards have been used under the Act for thirty years;

[this] Court has repeatedly held that certification is not the only route to representative status; and the 1947 attempt in the House-passed Hartley bill to amend §8(a)(5) was rejected by the conference committee that produced the Taft-Hartley Act. No amount of drumbeating should be permitted to overcome, without legislation, this history." Lesnick, *Establishment of Bargaining Rights Without an Election,* 65 Mich. L. Rev. 857, 861-862 (1967) (footnotes omitted).

2. The foregoing demonstrates that the Board has the authority to issue bargaining orders and that there is no absolute employer right to an election. We shall now show that the unfair labor practices here provide a proper basis for such an order.

Before turning to a consideration of the effect of bargaining orders on employees, employers, and unions, there are two preliminary points that should be noted. First, the unfair labor practices committed in the instant cases were proscribed by federal law over thirty years ago. Yet, as exemplified by these proceedings, "although the act is now reasonably mature, violations of its clearest and most fundamental provisions continue to mount" and the result is that "there is little doubt that in many plants an elemental fear of reprisal plays the major role in discouraging organizational activity among employees." Bok, *The Regulation of Campaign Tactics in Representation Elections Under the National Labor Relations Act,* 78 Harv. L. Rev. 38, 60 (1964). As the Chairman of the Board recently stated:

> "Violations of Sections 8(a)(3) and 8(b)(2) are, despite 33 years of industrial experience with the law, still the largest single source of all unfair labor practices, and over the years the percentage of such cases has not changed radically. In Fiscal Year 1967, for example, two out of three charges filed against employers—totaling 7,463 charges—alleged discriminatory discharge in violation of the Act. . . ." McCulloch, *New Remedies Under the National Labor Relations Act,* 68 LRR 60, 63 (1968); *see also,* Bok, *supra,* 78 Harv. L. Rev. at 60 n. 50, 124, n. 236; Report of the Special Subcommittee on Labor, Committee on Educa-

tion and Labor, House of Representatives, 90th Cong., 2nd Sess., *National Labor Relations Act Remedies: The Unfulfilled Promise*, 1-5, 30 (1968) (Thompson Report).

The reasons for the continuing prevalence of these hard-core violations are threefold. As first recognized and stated by this Court in *American Steel Foundries* v. *Tri-City Central Trades Council*, 257 U. S. 184, 209 (1921) and as restated in *National Labor Relations Board* v. *Jones and Laughlin Steel Corp.*, 301 U. S. 1, 33 (1937), organization has an inherent appeal for working men and women:

> "Long ago we stated the reason for labor organizations. We said that they were organized out of the necessities of the situation; that a single employee was helpless in dealing with an employer; that he was dependent ordinarily on his daily wage for the maintenance of himself and family; that if the employer refused to pay him the wages that he thought fair, he was nevertheless unable to leave the employ and resist arbitrary and unfair treatment; that union was essential to give laborers opportunity to deal on an equality with their employer."

Employers with an anti-union animus have also recognized that the "necessities of the situation" fuel organization drives and that the building of a successful union works a peaceful revolution which overturns the status quo and threatens their power and perquisites. An employer with 100 employees working eight hours a day, who estimates that the union will cost him 10¢ per hour per man in added wages, fringes, and bargaining costs, knows that every year he remains non-union means a savings of $20,000. He also realizes that, in addition to the threat to his pocketbook, the union poses a threat to the status he derives as sole master of the work place. Recognizing the size of the stakes and the force of the drive to organize among employees who are informed about organization, and who have not been coerced, an employer may well be tempted to resort to unlawful measures to alleviate his concern that the union would otherwise prevail. For employers recognize that if

they "can frustrate a union drive by firing several key union supporters, they may gain much more by staving off the union for a year or more than they will lose by eventually having to reinstate the employees with backpay." Bok, *supra*, 78 Harv. L. Rev. at 59, n. 46; 127.

This temptation to violate the Act is enhanced by the fact that the minimum benefit which may be expected in any event is delay. An employer who litigates an unfair labor practice charge through the Courts of Appeal is assured approximately two years before any remedy at all is imposed, Thompson Report 39-40. During an organizing campaign as during a strike, *Construction Workers* v. *Curry*, 371 U.S. 542, 550 (1963); *Liner* v. *Jafco*, 375 U.S. 301 (1964), time is one-dimensional—delay inevitably works for the employer. Employees seek representation in order to deal with immediate practical problems rather than to fulfill a timeless patonic ideal. If the desire for immediate representation is frustrated by delays caused by the employer's unfair labor practices, the union's strength tends to be dissipated even though the end result of the litigation is in its favor. For there are no means at its disposal to maintain and strengthen the employees' desire for unionization. In light of this fact, it is plain that effective remedies are of the essence. If the ultimate order does nothing more than revivify the campaign years after it was thwarted, there is every reason to violate the law and none but scruple to obey it. Once this is recognized, it is plain that an order to cease and desist is obviously insufficient in itself. It is an invitation to commit unfair labor practices to secure delay safe in the knowledge that the only cost of doing so will be an order not to repeat the violation.[1] Nor are orders to reinstate discriminatees with back pay sufficient in and of themselves where there are §8(a)(3) violations. Such orders do not even serve to make the discriminatee himself whole and in only 10% of the cases is there successful

[1] The Board's recent attempts to insure that the employees are effectively informed of the contents of these orders, *J. P. Stevens & Co.*, 157 NLRB 869 (1966), while course, a step forward does not tend to cure this inherent weakness.

permanent reinstatement, Thompson Report 35-38. And, of course, reinstatement two years after the fact is hardly likely to reassure the employees who would otherwise be disposed to support the union's on-going organizing campaign.[2] Nor is a Board-ordered rerun election the answer. Delay, the difficulty of expunging the vivid demonstration of the employer's economic power brought home to the employees by the prior illegal conduct, and the relative impotence of the cease and desist and reinstatement remedies continue to produce a situation in which it is likely that the employer will gain his central object—permanent defeat of the union. "It is important to bear in mind that an election is a far better cure for union than for employer misdeeds. And the fact remains that, in a regime where there has been just concern over the adequacy of the remedial scheme, the simple notion of doing over again what has worked badly once is hardly a reassuring method of undoing the effects of the abortive attempt." Lesnick, *supra*, 65 Mich. L. Rev. at 862 (footnotes omitted). Given the manifest inadequacy of the other remedies available, the *prima facie* case for the use of the remedial bargaining order is a strong one.

Second, as Prof. Lesnick has noted, there has of late been a good deal of "inappropriate romanticizing about employee free choice and its relevance to what actually goes on when employees are asked to vote for or against unionization . . . employees do not make decisions about unionzation for the same reasons or in the same context that they join veterans' organizations, political parties, churches or bowling leagues." Lesnick, *supra*, 65 Mich. L. Rev. at 865, 866-867. And the most vociferous romanticizers are employers faced with a bargaining order because they have demonstrated their lack of regard for employee free choice by resorting to restraint, coercion and discriminatory discharges. The fact of the matter is that our "scheme of

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[2] The foregoing disregards the possibility of enhancing this remedy through the use of the Section 10(j) injunctions since the latest figures available indicate that the Board seeks approximately 10 such injunctions a year, 32 Ann. Rep. of the NLRB.

collective bargaining is built on the foundation of economic power" and "the lawful coercion of collective bargaining must affect the intended free choice of the votes in a Labor Board election;" thus since "free choice connotes one protected from coercive measures, not merely one informed of them . . . it makes a mockery of free choice to invoke it as the interest which clamors for expression via an employer anti-union campaign," *Ibid.*

The potential for "lawful coercion" by employers is virtually unlimited. The very fact that the man who has sole control of an enterprise and consequently of the working lives of his auditors can state his opposition to unionism is bound to have some coercive effect, particularly in an area in which unions have little overall strength, *see* Karsh, Diary of a Strike, 114-115 (1958). Long before Marshall McLuhan, unions were well aware that the "medium is the message." This is not to imply that the content of lawful coercion in the message is insubstantial; the opposite is the case. Employers have the right to challenge a certification by refusing to bargain, thereby delaying matters for years after they have lost an election *cf., Pittsburgh Plate Glass Co.* v. *National Labor Relations Board,* 313 U.S. 146 (1941); to bargain hard, concede little or nothing and refuse to come to terms when the day of reckoning finally comes as long as they do so in good faith, *National Labor Relations Board* v. *American National Insurance Co.,* 343 U.S. 395 (1952); and to impose their views unilaterally after such bargaining, *cf., Fibreboard Paper Products Corp.* v. *National Labor Relations Board,* 379 U.S. 203 (1964). In addition, they have a variety of powerful economic weapons at their control: they may replace economic strikers permanently, *National Labor Relations Board* v. *Mackay Radio & Telegraph Co.,* 304 U.S. 333 (1938); they may lockout in support of legitimate bargaining demands, *American Ship Building Co.* v. *National Labor Relations Board,* 380 U.S. 300 (1965); and they may close down their operations for antiunion reasons as long as the purpose is not to chill unionization in other plants, *Textile Workers Union* v. *Darlington Mfg. Co.,* 380 U.S. 263 (1965).

Through a process of trial and error, and under the tutelage of trained advisers, highly effective methods of getting these points across have been developed.

In addition it is most certainly incorrect to view the prohibitions of §8(a) as an impentrable wall; it is closer to the truth to liken them to a sieve. Particularly in unorganized areas, the employees may be faced with concentrated opposition not only by their employer but also by the entire local power structure whose activities are beyond the Board's remedial sanctions unless they are acting as the employer's agents, Thompson Report 14-29. The use of the veiled threat and the predictive innuendo of harm by third persons has been raised to the status of an art form. Employers retain the right to discharge for good reasons, bad reasons, or no reason at all. Thus even in cases where a disinterested person's suspicions are aroused, proving a violation is no simple matter. Finally, even where the violation is clear, there are often practical difficulties which preclude effective enforcement. It is now settled that an employer who tenders benefits to his employees in order to influence their choice in a representation election violates the Act, *National Labor Relations Board* v. *Exchange Parts Corp.*, 375 U.S. 405 (1964). Yet unions are reluctant to file a charge, since the employees may feel that this action shows a certain disregard for their interests, *cf.* Bok, *supra*, 78 Harv. L. Rev. at 116. Similarly, this Court went to some pains to take steps to prevent the abuse of its ruling in the *Darlington* case, 380 U.S. at 274 n. 20. But a union campaigning for recognition is hardly in a position to demand that an employer who raises the subject of plant closure demonstrate that he seriously intends to carry out his threat.

In sum, because Congress has sought to pursue and harmonize a number of competing, and to some extent conflicting, goals the representation election process cannot be said to be a means for insuring the expression of pure free choice. Certainly there can be no doubt that an election marred by unfair labor practices does not express the choice of the employees. Thus the argument between those

who oppose the remedial bargaining order and those who favor it is not between those who favor associational self-determination and those who are indifferent to it. Rather, the substance of the dispute is whether the consequences of the coercive power of employers is to be maximized to the ultimate point in the name of employee free choice, or whether the coercive pressure of unfair labor practices is to be limited by invoking a remedy designed to thwart such conduct, in a manner as consistent with employee free choice as is possible under the circumstances.

3. When an employer commits violations of §§8(a)(1) & (3) during an organizing campaign, the union and its employee supporters have the right to expect an adequate remedy. And as we have shown, pp. 10-11, *supra*, the bargaining order meets this just expectation. Indeed it is the only presently available remedy which does so fully, and which tends to deprive the employer who has interfered with an organizing campaign of the fruits of his wrongdoing. As the instant cases demonstrate, the importance of an adequate remedy has too often been disregarded. Yet today, as prior to 1947, an integral element of our labor policy is to "encourag[e] the practice and procedure of collective bargaining . . . ," §1 of the Act. Only the trade union movement has the incentive, the resources, and the manpower to aid employees who wish to avail themselves of this basic right. These resources are not unlimited, however; and when an employer succeeds in frustrating an organizing campaign, thereby freeing himself from the obligation to bargain or requiring elaborate efforts at reorganization, there is a general effect on the advancement of collective bargaining. By increasing the costs of organizing, such illegal anti-union activity decreases the union movement's ability and incentive to take steps to effectuate this federal policy. Moreover successful defiance of the Act places at a disadvantage those employers who abide by its provisions. In a competitive economic system, the consequence will naturally tend to be an increase in the number of situations in which there is a lawless reaction

to organizing campaigns, Thompson Report 30. To paraphrase Gresham's law, lawlessness will tend to drive out lawfulness.

It is, of course, well settled that even one who violates the Act may insist that the Board's order be "remedial not punitive" *Consolidated Edison Co.* v. *National Labor Relations Board,* 305 U.S. 197, 235 (1938), and that it be "a reasonable attempt to put aright matters the unfair labor practice set awry," *Local 60 Carpenters* v. *National Labor Relations Board,* 365 U.S. 651, 658 (1961) (Harlan J., concurring). The remedial bargaining order is clearly well within those confines established by this Court. For its effect is entirely prospective, and the total commitment required of the wrongdoer is that he bargain in good faith, *cf, ILGWU* v. *National Labor Relations Board (Bernhard-Altmann),* 366 U.S. 731 (1961). And because of the substantive nature of this duty, the practical effect of the order on an employer is ultimately a matter of the economic strength of the parties rather than one of governmental dictation, *American National Insurance, supra,* 343 U.S. 395.

In light of the insubstantiality of the employer's interest, it is not surprising that those opposed to the bargaining remedy have laid great stress on its supposedly deleterious effect on employees who have not supported the union or whose support has wavered after the commission of the employers unfair labor practices. It is most unlikely that these deleterious effects pose a serious practical problem. If no contract is reached as a result of the bargaining order, these employees are essentially unaffected by its terms. For the union has no power at its command to force them into membership, or to force them to support its demands by striking. And it is chimerical to suppose that an employer who has actively fought the union will sign a contract which disadvantages his employee-supporters and establishes the union in the plant. It is equally far-fetched to assume that a union which has fought for the right to represent employees would destroy its support by signing such a contract. Indeed, to say that collective bargaining

is a threat to the well-being of employees is to disregard one of the basic presuppositions of the Act—that there is an "inequality of bargaining power" between unorganized employees and their employers, §1 of the Act.

The fear that the bargaining order will have a serious effect on employee free choice is equally spurious. This is perfectly plain if a contract is not negotiated with great promptness. For the bargaining order requires only a limited experiment in collective negotiation. After bargaining is given a reasonable period in which to work, the employees may exercise their right under §9(C)(1)(A)(ii) to file a decertification petition *see The Daily Press Inc.*, 112 NLRB 1434 (1955); *cf.*; *National Labor Relations Board* v. *Universal Gear*, 394 F.2d 396 (C.A. 6th Cir., 1968). On the other hand, if a contract is reached, it is strong evidence that the union has succeeded in mobilizing majority support. For in cases where the remedial bargaining order is utilized, the employer will have made his opposition to unionization crystal clear, and §8(d) of the Act leaves no doubt that he has no legal obligation to make concession to the union. If a bargain is struck it is perfectly rational to conclude that it was the practical reality of the employees' determination to fight for, and secure the contract that was conducive to agreement. Moreover, even where a contract is reached it is not beyond the Board's powers, in appropriate circumstances, to allow for a further test of the employees' sentiments, *cf.*, *Garwin Corp.*, 153 NLRB 664, 667 *modified*, 374 F.2d 295 (C.A.D.C. Cir., 1967) *certiorari denied* 387 U.S. 942.

In sum, we suggest that the bargaining order is consistent with the manifold purposes and policies of the Act after the entire range of interests at stake has been considered. While it is not apparent from the decisions of the court below, this conclusion is by no means revolutionary; for this Court reached it twenty-five years ago in its unanimous opinion in *Franks Bros., supra.*, 321 U.S. at 705:

> "The Board might well think that, were it not to adopt [the bargaining order] remedy, but instead order elections upon every claim that a shift in union mem-

bership had occurred during proceedings occasioned by an employer's wrongful refusal to bargain, recalcitrant employers might be able by continued opposition to union membership indefinitely to postpone performance of their statutory obligations . . . That the Board was within its statutory authority in adopting the remedy which it has adopted to foreclose the probability of such frustrations of the Act seems too plain for anything but statement. See 29 USCA §160(a) and (c), 9 FCA title 29, §160(a) and (c).

"Contrary to petitioner's suggestion, this remedy, as embodied in a Board order, does not involve any injustice to employees who may wish to substitute for the particular union some other bargaining agent or arrangement. For a Board order which requires an employer to bargain with a designated union is not intended to fix a permanent bargaining relationship without regard to new situations that may develop."

4. We submit that the following conclusions emerge from the foregoing. First, there are situations, of which the instant cases are examples, in which the employer's actions may be fairly said to demonstrate a purpose or intent to defeat an organizing campaign by restraining and coercing his employees through violations of §§8(a)(1) & (3), rather than by employing the considerable lawful weapons at his command, *see* pp. 11-13 *supra*. These situations do not include those in which there is a single minor violation which may be considered an inadvertent excess in a generally lawful anti-union campaign, *see, Hammond & Irving, Inc.*, 154 NLRB 1071 (1965). But where as in each of these cases there has been a pattern of interference by threats, promises of benefits, or even discriminatory discharges, the conclusion that such violations are calculated to frustrate unionization is inescapable.

Second, both sides recognize that during an organizing campaign the ultimate object of the exercise is collective bargaining. When the employer perpetrates deliberate violations of the Act, the practical question is whether the remedy will include a bargaining order. If so, the proceeding to vindicate the rights and privileges safeguarded by §8(a) is meaningful; if not, it is basically a futile exercise

in fact-finding which allows the wrongdoer to retain the most important fruit of his wrongdoing—the frustration of an organizing effort that might otherwise have succeeded.

Third, the issuance of a bargaining order to correct calculated §§8(a)(1) & (3) violations "can fairly be said to effectuate the policies of the Act." *Virginia Electric Power Co.* v. *National Labor Relations Board*, 319 U.S. 533, 540 (1944). Normally employees decide whether or not to organize without having the opportunity to see their prospective bargaining representative in action in the specific context in which they are interested. The employer's performance is the only known quantity, and the union must overcome the handicap of being an outsider. In order to compensate for the deleterious effect of the delay caused by the employer's violations and to "encourage the practice and procedure of collective bargaining," it is proper to decree a limited experiment in bargaining. And such a decree, far from being an impediment to employee free choice, actually serves to further that interest. For the employees remain free to withhold their support from the union and to decertify it after a reasonable period of time *see* p. 16 *supra*. If, on the other hand, no bargaining order is issued, the employees in question will at best make a post-NLRB order decision on organization with no more personal experience as to the nature of the bargaining process than that with which they began. They will, however, have learned from personal experience that the employer has the power to delay bargaining indefinitely by violating the law and that the Board does not have the power to bring him to book for his wrongs. And this lesson will in all likelihood serve to demoralize the union and its supporters.

Thus the bargaining order serves the interest in employee free choice in two ways. It affords an opportunity for employees to make their final decision on unionization after having tested their preconceptions against facts. Moreover "in the last analysis those who would resist this remedy in the name of the employees must answer for the employees whose free choice is currently impaired by the lack of adequate remedies. As matters now stand, there are many

workers whose apprehensions cannot be allayed by notices posted in the plant or by the possibility of reinstatement and backpay at some future date." Bok, *supra;* 78 Harv. L. Rev. at 135-136. In short, it is only by seriously overestimating the bite of a bargaining order and by minimizing the need for this remedy that the court below was able to reach the conclusion it did.

Fourth, if the bargaining order is employed as a remedy for willful attempts to interfere with organizing campaigns illegally, the only prerequisite to the issuance of the order, other than the proof of the §§8(a)(1) & (3) violations, should be a showing from which the Board could rationally conclude that the issuance of the order would not be a futile act. *Cf* Bok., *supra.*, 78 Harv. L. Rev. at 138. There should be no need to prove an antecedent majority. As *Franks Bros.* illustrates there are situations in which an employer may be ordered to bargain even though the union cannot demonstrate a majority. For "in an equity suit, the end to be served is not punishment of past transgression, nor is it merely to end specific illegal practices. A public interest served by such civil suits is that they effectively pry open to competition a market that has been closed by defendants' illegal restraints. If this decree accomplishes less than that, the Government has won a lawsuit and lost a cause." *International Salt Co.* v. *United States,* 332 U.S. 392, 401 (1947). By the same token, where an employer has frustrated an organizing campaign through substantial §§8(a)(1) & (3) violations, the order must "effectively pry open to [bargaining] a [plant] that has been closed by [the employer's] illegal restraints." If proof of majority is required, employers will be tempted to commit their unfair labor practices early enough in the game to insure that the union never approaches majority status, a technique already extensively employed by the J. P. Stevens Co., *see, J. P. Stevens & Co.* v. *National Labor Relations Board,* ..... F.2d ....., 70 LRRM 2104 (C.A. 4th Cir., 1969); Thompson Report 30-33. Moreover, as the record in the instant cases demonstrates, there are substantial administrative burdens incidental to the determination

of whether the union achieved a majority. These burdens add to the already critical problem of delay and should be removed.

Alternatively if some proof of majority support is to be required it should suffice for the union to show that half of the employees had enough interest in exploring the question of representation either to support a petition for an election, or to sign authorization or membership cards. Focusing on the question of whether the union had an antecedent majority, some courts have insisted that any mention of an election either on an authorization card, or by a union solicitor, opens the union's showing of support to impeachment based on the signing employees' later testimony, e.g. *National Labor Relations Board* v. *Petersen Bros.*, 342 F.2d 221 (C.A. 5th Cir., 1965); *National Labor Relations Board* v. *Nichols Co.*, 380 F.2d 438 (C.A. 2nd Cir., 1967). Whatever validity this view may have where there are no violations of §§8(a)(1) & (3) in the picture, *but see, Cumberland Shoe Corp.*, 144 NLRB 1268 *enforced*, 351 F.2d 917 (C.A. 6th Cir., 1965), it is plain that it has no place under the test we propose to cover cases in which those unfair labor practices are committed. As we have stressed, in such cases the order is in essence predicated on the existence of the violations rather than on the proof of majority; thus evidence tending to show that the employees were willing to give support to a move to reconsider the status quo should be deemed acceptable. For it is the employers wrongdoing which has precluded a more exact test.

Moreover, it seems plain that where the employer has resorted to restraint and coercion, every consideration of sound administration supports the rule that "an employee's thoughts (or afterthoughts) as to why he signed a union card, and what he thought the card meant, cannot negate the overt action of having signed a card designating a union as bargaining agent" *Joy Silk Mills* v. *National Labor Relations Board*, 185 F.2d 732, 743 (C.A.D.C.Cir., 1950). It is inherently unfair to require an employee, in effect, openly to reaffirm his interest in organization after his employer has made it clear that he opposes unionization

and that he is prepared to violate the law if his employees do not bow to his preference. Evidence given long after the fact, and under such circumstances, is simply not probative enough to accept. The simplification of the proof required as a precondition to the issuance of a remedial bargaining order just proposed accords with settled doctrine: "The most elementary conception of justice and public policy require that a wrongdoer shall bear the risk of the uncertainty which his own wrongdoing has created" *Bigelow* v. *RKO Radio Pictures,* 327 U.S. 251, 265 (1946).

CONCLUSION

For the above-stated reasons, as well as those set out by the Petitioners, the decisions of the court below should be reversed.

Respectfully submitted,

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